



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Civil Appli 47 of 2008

SIMON KABURUAPPLICANT

AND

JANE NKUENE KIRIMA.....RESPONDENT

(Application for extension of time to file and service notice and record of appeal from a decree, order of the High Court of Kenya at Meru (Lenaola, J) dated 24th July 2007

in

H.C.Succession Cause No. 31 of 2001

RULING

The applicant Simon Kaburu seeks extension of time under Rule 4 of the Court of Appeal Rules for:-

- (i) filing and serving a notice of appeal and for
- (ii) filing and serving the record of appeal.

The applicant intends to file an appeal against the ruling of the superior court at Meru (Lenaola, J) delivered on 24th July 2007 whereby the superior court declared the respondent as the sole heir of land parcel No. Igoji/Kinoro/845 which formed part of the estate of Kirima M'Mungania (deceased). The superior court granted letters of administration jointly to the applicant as a son of the deceased and the respondent as 2nd widow of the deceased. Thereafter the court considered the dispute on the distribution of the estate. Initially the applicant had disputed that the respondent was a 2nd widow of his deceased father but the superior court made a finding that she was indeed the 2nd widow of the deceased. That fact is not disputed by the applicant as he disposes in the supporting affidavit that the respondent is his step mother. The estate of the deceased comprised of nine pieces of land and two market plots. The superior court distributed eight pieces of land, namely, L.R No. Igoji/Kinoro/1672 – 1678 and L.R No. Igoji/Kinoro/1644 to the sons and daughters of the 1st wife – Elizabeth Kirima. The first wife was given a life interest in L.R No. Igoji/Kinoro/1673 and one market plot. The superior court only allocated L.R Igoji/Kinoro/845 and one market plot to the 2nd respondent who has three daughters admittedly begotten before she was married by the deceased.

Needless to say the unfettered discretion of the court to extend time under **Rule 4** of the Court of Appeal Rules is exercised judicially. In exercising its discretion the court considers such factors as the length of the delay, the reasons for delay, the merits of the intended appeal or appeal, and the likelihood of the respondent suffering prejudice if the application is allowed.

The application is supported by a short affidavit. Regarding the reasons for delay, the applicant deposes that the ruling of the superior court was read in his absence and in the absence of his advocate; that he later visited the court registry and discovered that the ruling was read; that he went to see his advocate who told him that he had already filed a notice of appeal; that after waiting for a long time he again went to the registry and was informed that notice of appeal had not been filed; that he immediately saw his advocate who told him that he would not appeal and it is due to the mistake of his advocate that the notice of appeal and the record of appeal were not filed.

The record of 24th July 2007 when the ruling was read by the superior court does not support the applicant's assertion that the ruling was read in his absence. Indeed the record shows that the applicant was present. The applicant does not give essential particulars of the dates he visited the registry or his advocate's offices.

There is therefore no concrete and credible evidence that the applicant had instructed his advocate to file a notice of appeal or that he was actively pursuing the matter with his advocate. If the applicant indeed intended to appeal against the decision of the superior court he could have written to court requesting for a copy of proceedings and ruling. If he did so time taken to obtain a copy of proceedings and ruling would have been excluded. The applicant did not write to court requesting for a copy of the proceedings or ruling. It is improbable that the applicant's advocate then on record could have failed to file a notice of appeal which is a simple document if he was so instructed by the appellant.

The present application was filed on 23rd October 2008 over seven months since the superior court delivered the ruling. The delay in the circumstances of this case is inordinate. The delay in my view has not been satisfactorily explained.

The intended appeal is against the allocation of land parcel No. Igoji/Kihoro/845 to the respondent as a sole heir. The applicant intends to appeal on four grounds in the draft memorandum of appeal. In distributing the estate the superior court was exercising its discretion. It is apparent that the superior court allocated eight pieces of land to the sons and daughters of the first wife and only allocated one piece of land to the respondent. There are no discernable valid grounds of appeal and the intended appeal *ex facie* appears frivolous.

The respondent is likely to suffer prejudice if the application is allowed as prolonged litigation will unsettle her. It is just in the circumstances that the dispute be brought to an end.

For those reasons I dismiss the application with costs to the respondent.

Dated and delivered at NYERI this 31st day of October 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR